

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Petition of the Multifamily Broadband Council
Seeking Preemption of Article 25 of the San
Francisco Police Code

DA 17-318
MB Docket No. 17-91

REPLY COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-6771
E-Mail: william.sanders@sfgov.org

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY 1

II. SAN FRANCISCO’S RESPONSE TO THE COMMENTS FILED BY THE OTHER PARTIES TO THIS PROCEEDING 3

 A. The Commission in this Proceeding Is Acting in a Quasi-Judicial Capacity, so its Decision to Preempt Article 52 Must be Based Solely on Existing Law 3

 B. None of the Comments Show that Federal Law or Any Commission Regulations, Orders, or Decisions, Preempt Article 52 4

 C. The Commission Should Not Be Persuaded by the Exaggerated Concerns Expressed in the Comments over that Part of Article 52 that Allows for the Sharing of Existing Wiring 5

 D. Article 52 Does Not Abrogate Existing Bulk-Billing Arrangements or Bar Providers from Entering into New Bulk-Billing Arrangements; and the Commission Has Already Found Bulk-Billing Arrangements Do Not Exclude Other Providers from Offering Services 7

III. CONCLUSION 10

I. EXECUTIVE SUMMARY

This matter concerns the Petition filed by the Multifamily Broadband Council (“MBC”) asking the Federal Communications Commission (“Commission” or “FCC”) to preempt Article 52 of the City and County of San Francisco (“City” or “San Francisco”) Police Code (“Article 52”).

The parties filing comments in support of MBC’s Petition for the most part ignore the fact that the Petition concerns whether federal law, and existing Commission regulations, orders, and decisions preempt Article 52.¹ While many of the proponents ask the Commission to find that Article 52 “conflicts” with federal law and Commission policy, they provide scant legal analysis and nothing supporting such a finding. Rather, they urge the Commission to find that the policy reasons for adopting Article 52 are misguided and that San Francisco’s law, while intended to foster competition, “discourages competition” and “infrastructure investment” in multiple dwelling units (“MDUs”).² They also suggest that Article 52 “ignores technical problems created by mandating multi-provider access to wiring, will increase prices and reduce service quality for MDU residents”.³ Finally, they are concerned that Article 52 will limit their ability to continue to enforce their existing bulk-billing arrangements and enter into new ones.⁴

What is clear from the proponents’ comments is that they like the status quo. The private cable operators (“PCOs”), internet service providers (“ISPs”), and property owners filing comments in support of the Petition all want the Commission to allow them to continue to operate under the exclusive access agreements they have enjoyed for years.

¹ On May 18, 2017, San Francisco and other parties filed their opening comments in this proceeding. The parties filing comments in support of MBC’s Petition consist largely of two groups. The first are private cable operators and internet service providers. The second are entities that own large numbers of multiple dwelling units throughout the United States. None of the country’s large cable operators or telecommunications carriers offering broadband and video services filed comments.

² Comments of AvalonBay Communities, Inc. at 1 (“AvalonBay Comments”).

³ Comments of the National Multifamily Housing Council at 1 (“NMHC Comments”); *see also* Comments of the NCTA – The Internet and Television Association at 1-2 (“NCTA Comments”).

⁴ *See* Comments of Elauwit Networks, Inc. at 4 (“Elauwit Comments”) 4; Comments of Spot On Networks, LLC at 4 (“Spot On Comments”); Comments of Data Stream, Inc. at 4 (“Data Stream Comments”); *and* Comments of Vicidiem, Inc. at 4 (“Vicidiem Comments”).

As San Francisco explained in its comments, the Commission should dismiss the Petition, because there is no conflict between federal law and existing Commission regulations, orders, or decisions. Nor is there a basis for the Commission to find that the federal law occupies the “field” of cable home and home run wiring.⁵ Rather than being preempted, Article 52 complements the Commission’s regulations and orders by fostering competition among communications services providers in MDUs and further enables consumer choice. Moreover, the Commission is acting here in a quasi-judicial capacity, so it must look to federal law, or existing Commission regulations, orders, or decisions, to preempt Article 52.

San Francisco also addresses the two overriding concerns addressed in the proponents’ comments—access to existing wiring and potential impacts on bulk-billing arrangements—even though they do not present legal grounds for the Commission to preempt Article 52.

First, San Francisco shows that, while Article 52 allows communications services providers to seek access to “existing wiring” it protects property owners and existing providers by allowing property owners to refuse such requests if there is insufficient space or sharing would jeopardize existing services. Second, San Francisco shows that Article 52 does not abrogate existing bulk-billing arrangements, nor does it prohibit communications services providers from entering into new bulk-billing arrangements. To the extent Article 52 allows a second communications services provider to access buildings that have existing bulk-billing arrangements, Article 52 merely supports the Commission’s policy to allow all tenants in MDUs to have a choice of communications services providers.

⁵ See Comments of the City and County of San Francisco at 10-27 (“San Francisco Comments”).

II. SAN FRANCISCO'S RESPONSE TO THE COMMENTS FILED BY THE OTHER PARTIES TO THIS PROCEEDING

A. The Commission in this Proceeding Is Acting in a Quasi-Judicial Capacity, so its Decision to Preempt Article 52 Must be Based Solely on Existing Law

As the Media Bureau sets out in the Public Notice, MBC argues in its Petition “that Article 52 conflicts with the Commission’s policies on (1) competitive access to inside wiring in multiple dwelling unit buildings, (2) bulk billing arrangements, and (3) network unbundling.”⁶ MBC also asserts that “federal laws with respect to inside wiring are so dominant as to preempt the field of law that Article 52 occupies.”⁷ Thus, both the Petition and the Public Notice call for the Commission to act in a quasi-judicial capacity. In that capacity, the Commission can only review federal law and existing Commission regulations, orders, and decisions to determine whether those laws, regulations, orders, and decisions preempt Article 52.⁸ The Commission cannot in this proceeding issue new regulations or decide as a policy matter that Article 52 is preempted.⁹

The court in *Town of Deerfield v. F.C.C.* addressed a similar situation.¹⁰ In that case, a town resident filed a petition with the Commission asking the Commission to exercise its authority under 47 C.F.R. section 25.104¹¹ to preempt a town ordinance prohibiting the installation of a satellite dish or tower type antennas on any lot smaller than one-half acre.¹²

⁶ *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, 2017 WL 1234678, at *1 (2017) (footnotes omitted).

⁷ Petition at 29-32.

⁸ See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734 (1978) (if the Commission is not engaging in a formal rulemaking it cannot address “possible action in other contexts”).

⁹ In fact, on June 1, 2017 the Commission announced that in its June open meeting it would consider opening a new proceeding to address the policy implications of local regulations like Article 52. See GN Docket No. 17-142, *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry. That would be the appropriate time for the Commission to make new policy.

¹⁰ *Town of Deerfield v. F.C.C.*, 992 F.2d 420 (2d Cir. 1993).

¹¹ 47 C.F.R. § 25.104 is entitled “Preemption of local zoning of earth stations.” It provides in part that “[a]ny state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable.”

¹² *Town of Deerfield*, *supra*, 992 F.2d at 423–424.

The Commission issued a public notice of the petition and received comments from a number of entities in support of the petition.¹³ The Commission then issued a ruling preempting the ordinance.¹⁴

The court found that the Commission was acting in a “quasi-judicial” capacity.¹⁵ “A decision by the Commission is quasi-judicial if it does “not purport to engage in formal rulemaking or in the promulgation of any regulations” but instead amounts to an adjudication of the rights and obligations of parties before it.”¹⁶ The Commission’s function in that proceeding, therefore, was solely to interpret its regulations to determine whether they preempted the town’s ordinance. The petition did not require, or even allow, the Commission to “promulgate any new regulation or purport to engage in any formal rulemaking.”¹⁷

Here, the Commission stated in the Public Notice that its sole purpose was to determine whether existing federal law and Commission regulations, orders, and decisions preempt Article 52, thus acknowledging its quasi-judicial role. The Commission may not use this Petition to adopt regulations or rulings that establish new or different grounds for preempting Article 52, based on the policy concerns raised in the Petition and in the filed comments.

B. None of the Comments Show that Federal Law or Any Commission Regulations, Orders, or Decisions, Preempt Article 52

Most of the comments filed in support of the Petition failed to address the legal issues presented in the Petition. Rather, most commenters address policy issues and ask the

¹³ *Id.* at 425–426.

¹⁴ *Id.* at 426; see *In the Matter of Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, N.Y.*, Memorandum Opinion and Order, 7 FCC Rcd. 2172 (1992), reversed by, *Town of Deerfield, supra*, 992 F.2d at 430.

¹⁵ *Town of Deerfield, supra*, 992 F.2d at 427.

¹⁶ *Id.* at 427, quoting *F.C.C. v. Pacifica Foundation, supra*, 438 U.S. at 734; see 5 U.S.C. § § 551, 554; and *Abraham Lincoln Mem. Hosp. v. Sebelius*, 698 F.3d 536, 559 (7th Cir. 2012) (internal quotation marks omitted) (“Adjudications typically resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals.”).

¹⁷ *Town of Deerfield, supra*, 992 F.2d at 427.

Commission to establish new and different policies that could have the effect of preempting Article 52.¹⁸

As discussed above and in San Francisco’s comments, the Commission should dismiss the Petition in its entirety because such policy arguments provide no basis for preemption.

C. The Commission Should Not Be Persuaded by the Exaggerated Concerns Expressed in the Comments over that Part of Article 52 that Allows for the Sharing of Existing Wiring

The proponents focus on that part of Article 52 that they claim “forc[es] . . . property owners to allow all comers to access a property’s wiring”.¹⁹ They predict that such sharing would lead to poor quality service and unwarranted service interruptions.²⁰ As NCTA asserts:

The [technical] issues noted above arise solely as a result of the requirement that building owners provide third parties with access to building wiring. In contrast, where a competitive provider deploys its own wiring, a customer in the building should be able to purchase services from multiple providers without any concerns about one service interfering with another.²¹

San Francisco agrees that Article 52 allows a communications services provider to seek access to existing wiring. San Francisco’s elected officials had reason to believe that agreements prohibiting the sharing of existing wiring were barriers to competition in MDUs. They were not the only ones that had such concerns. As INCOMPAS informed the Commission a few months ago:

[W]iring exclusivity arrangements have allowed incumbent MVPDs to prevent utilization of existing inside wiring even after a customer has

¹⁸ For example, the NMHC’s filed comments are 15 pages long. Less than three of those pages address the issue of whether federal law preempts Article 52. See NMHC Comments at 2-5. The remainder of the comments address policy concerns. Some commenters do not even mention preemption or do so only in the introduction and/or conclusion—let alone offer any analysis of the issue. See AvalonBay Comments; Comments of Blue Top Communications; Data Stream Comments; Comments of Direct Plus, LLC; Elauwit Comments; Comments of Holland Partner Group; Comments of Realtycom Partners; Comments of Satel, Inc.; Spot On Comments; and Vicidiem Comments.

¹⁹ Vicidiem Comments at 3; *and* Comments of GigaMonster, LLC at 2 (“GigaMonster Comments”); *see also* National Apartment Association Comments at 9; *and* NCTA Comments at 4-5.

²⁰ See Comments of DIRECPATH, LLC at 2 (“DIRECPATH Comments”); Vicidiem Comments at 4.

²¹ NCTA Comments at 5; *see also* Comments of Camden Property Trust at 5-6 (“Camden Comments”).

ceased service. As you are aware, the incumbent provider is required by law to either make the wiring available to another MVPD or remove it. However, incumbents enter into agreements with MDUs to lease this fallow wiring on an exclusive basis, forcing competitive providers into the difficult position of having to choose between installing duplicative in-unit wiring or not serving the building at all. As explained recently by ITTA, this access “is required by law to ensure that consumers in apartment buildings and similar places can obtain video service from a competing provider.” This exclusive leasing practice is now defeating that intent and deterring competitive providers from serving those MDUs.²²

Nonetheless, Article 52 makes sure that the doomsday scenarios suggested in the proponents’ comments will not occur. It does that by allowing a property owner to deny a request to share existing wiring when: (i) “physical limitations at the property prohibit” such sharing;²³ or (ii) such sharing will have “a significant adverse effect on the continued ability on existing communications services providers to provide services on the property”²⁴.

The comments filed by proponents and opponents of the Petition suggest that sharing of existing wiring may not be technically feasible in many buildings.²⁵ Sonic is the one provider in San Francisco that has filed comments in this proceeding.²⁶ Sonic supported Article 52 before the Board of Supervisors and continues to support it today in this proceeding.²⁷ Sonic is actually using Article 52 to obtain access to properties had formerly been closed off.²⁸ Sonic acknowledges, however, that it is “technically infeasible for two service providers to literally share inside wire without significant degradation to both their services”.²⁹ For this reason, to provide its Gigabit Fiber service Sonic deploys its own fiber-optic facilities through the building risers and conduits.³⁰

²² Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene H. Dortch, Secretary, FCC at 4 (Feb. 13, 2017) (footnotes omitted) (available at: <https://ecfsapi.fcc.gov/file/10213980822348/Ex%20Parte%20Letter%20for%20Chairman%20Pa%20Meeting%20on%20Feb.%209%2C%202017--Broadband%20Deployment%20Agenda.pdf>).

²³ S.F. Police Code § 5206(b)(3).

²⁴ S.F. Police Code § 5206(b)(5)(B).

²⁵ DIRECPATH Comments at 2.

²⁶ See Declaration of Dane Jasper (“Jasper Decl.”) attached to CalTel Comments.

²⁷ Jasper Decl. at ¶¶ 18-20.

²⁸ Jasper Decl. at ¶ 21.

²⁹ Jasper Decl. at ¶ 25.

³⁰ Jasper Decl. at ¶ 23.

In one comment, the CEO of InfiniSys, Inc., a company that designs “low voltage” facilities for the “multifamily industry”, explains the technical reasons inside wiring cannot be shared:

Allowing more than one provider to access the same home run, at different times, of unshielded twisted pair (e.g., Cat 5, Se, or 6) data cabling (“UTP”) or coaxial video cabling poses a number of technical and practical challenges. We would never recommend this, unless proper physical cross-connect fields are placed at every [intermediate distribution frame] and the main distribution frame (“MDF”) and unit distribution panel (“UDP”) with labeling complying with the industry standard, TIA-606B.³¹

Furthermore, according to some of the property owners’ comments, sharing inside wiring is not necessary particularly in new buildings. AvalonBay Communities, which owns property in San Francisco, claims that it has allowed two or even three providers into each of its San Francisco properties. It also states that it will “frequently install multiple home runs of cabling to ensure each provider has exclusive use of the wiring specifically designated for its use.”³² Camden Property Trust similarly asserts that it “routinely installs extra conduit, microduct and other pathways” to enable other providers to offer services on its property.³³ No reasonable provider would opt to share inside wiring when separate wiring is readily available.

These concerns over sharing of existing wiring do not provide a legal basis for the Commission to grant the Petition and preempt Article 52. In addition, Article 52 provides building owners and communications providers with adequate safeguards to prohibit sharing of existing wiring whenever such sharing is not feasible.

D. Article 52 Does Not Abrogate Existing Bulk-Billing Arrangements or Bar Providers from Entering into New Bulk-Billing Arrangements; and the

³¹ Declaration of Richard Holtz of InfiniSys, Inc. at ¶ 3 (attached to the NMHC Comments). He then goes on to identify a slew of “challenges” that “may occur over time” when inside wiring is being shared. *Id.*

³² AvalonBay Comments at 3, ¶ 6.

³³ Camden Comments at 4.

Commission Has Already Found Bulk-Billing Arrangements Do Not Exclude Other Providers from Offering Services

Proponents of the Petition focus most of their attention on the possibility that Article 52 could negatively affect existing bulk-billing arrangements, while making it more difficult to enter into such arrangements in the future.³⁴ According to one ISP, bulk-billing arrangements are beneficial to all parties:

GigaMonster frequently enters into bulk billing contracts with property owners, as they are mutually beneficial to ISPs, PCOs, and tenants. They allow GigaMonster to offer reduced prices to tenants by spreading fixed costs among many subscribers using common facilities. Many communities serviced by GigaMonster and other private ISPs and PCOs would have been unable to provide advanced services, such as gigabit speeds and 4K video programming, without the guarantee of a bulk billing arrangement.³⁵

While San Francisco agrees that this statement appears to be accurately describe the benefits of bulk-billing arrangements, San Francisco disagrees that:

Article 52 effectively overrides bulk billing arrangements by requiring property owners to allow any communications service provider to enter his or her property and share the property owner's existing wiring. Under these circumstances, it is virtually impossible for the provider to serve all or nearly all of the tenants in a building.³⁶

As San Francisco showed in its comments, the Commission issued regulations transferring control of inside wiring and prohibiting exclusive access agreements to benefit consumers by fostering competition at MDUs—not to protect the business models of a small group of providers.³⁷ As some PCOs note, they were the entities that “directly benefited from the FCC’s inside wiring rules” because previously “PCOs were shut out from being able to serve thousands of communities, due to anti-competitive agreements signed by large providers.”³⁸

³⁴ It is worth noting that no entity owning property in San Francisco that filed comments mentions concerns over existing bulk-billing arrangements, and neither does the one entity providing communications services in San Francisco. *See generally*, AvalonBay Comments; Declaration of Michael Manelis of Equity Residential (attached to the NMHC Comments); and Satel Comments.

³⁵ GigaMonster Comments at 2-3, ¶ 8.

³⁶ GigaMonster Comments at 2-3, ¶ 8; *see also* Camden Comments at 8 (“the benefits of bulk service arrangements are inextricably linked to a single service provider having exclusive access to the wiring and related infrastructure installed at an MDU”).

³⁷ *See* San Francisco Comments at 16-17.

³⁸ DIRECPATH Comments at 4, ¶ 12.

Yet, those same PCOs now want the Commission to preempt the City’s ordinance so that they can continue to rely on their own “anti-competitive agreements” to “shut out” their competitors.

What the proponents’ comments make clear is something the Commission recognized when it chose not to preempt bulk-billing arrangements: consumers living in buildings with bulk-billing arrangements should have the option to obtain service from a different provider—even if that requires the payment of a second fee.³⁹ As the Commission stated:

A bulk billing agreement does not prevent MDU residents from obtaining services from another MVPD, assuming that another has wired or will wire the MDU, if necessary. Some residents may also place satellite dishes on their premises, depending on the physical configuration of their units. Any such residents, however, must pay for both the bulk billing MVPD and the services of the other MVPD.⁴⁰

While Article 52 allows communications providers to obtain access to MDUs served under bulk-billing arrangements, providers are unlikely to use its provisions to obtain access to those properties. In the typical bulk-billing arrangement the “building owner agrees to purchase some level of service for the entire MDU so that the service is available in each unit over the building’s inside wiring.”⁴¹ For that reason, in most MDUs served under bulk-billing arrangements the “residents pay no separate fee for the service provided on a bulk billing basis; it is included in the rent.”⁴² In other bulk-billing situations where there are separate charges, the typical tenant will save between \$30 and \$70 per month “versus the average cost they would pay for the same services on an individual subscriber basis.”⁴³ Finally, such bulk-billing

³⁹ See GigaMonster Comments at 3, ¶ 11 (some persons living in MDUs with bulk-billing arrangements “may enjoy the choice of another service provider, if they have the means to exercise that choice”).

⁴⁰ *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and other Real Estate Developments*, Second Report and Order, 25 FCC Rcd. 2460, 2465 at ¶ 14 (2010) (footnotes omitted).

⁴¹ NCTA Comments at 6; see also DIRECPATH Comments at 3, ¶¶ 9-10 (bulk-billing agreements “allow DIRECPATH to offer reduced prices to the residents because 100% of the residents are enrolled” and building owners “are obligated to pay the provider for service to each unit”).

⁴² NCTA Comments at 6-7.

⁴³ Camden Comments at 3.

arrangements are often in senior housing, nursing homes, low- or fixed-income housing, student housing, etc.⁴⁴

Under these circumstances, there seems to be virtually no basis for the PCOs' concerns that Article 52 "undermines the economics of bulk billing arrangements" and has "adverse effects on the vast majority of MDU residents".⁴⁵ A second provider may not be able to beat or even match the "free" or discounted prices offered by the property owner of an MDU with a bulk-billing arrangement. Residents of senior housing, nursing homes, low- or fixed-income housing, etc. are unlikely to be willing to incur the expense of a second or more expensive communications service. A communications provider seeking access to such a building at the request of one or a handful of tenants would need to determine whether its service is economic in light of the bulk-billing arrangement. If the commenters are correct that the arrangement is uneconomic, then they have nothing to worry about.

These comments expressing concern over bulk-billing arrangements do not provide a legal basis for the Commission to grant the petition and preempt Article 52. Nor does Article 52 expressly prohibit bulk-billing arrangements, either those that presently exist or on a going forward basis. Finally, the Commission has already determined that competition in MDUs with bulk-billing arrangements should be allowed.

III. CONCLUSION

For the reasons stated in San Francisco's comments and in these reply comments, San Francisco respectfully requests that the Commission dismiss the Petition to preempt Article 52 of the San Francisco Police Code. Neither the Multifamily Broadband Council, nor any party filing comments in support of the Petition, have provided the Commission with a legal basis for the Commission, acting in a quasi-judicial capacity, to determine that federal law, or any existing Commission regulations, orders, or decisions, preempt Article 52.

⁴⁴ GigaMonster Comments at 3, ¶ 11; Declaration of Scott P. Casey, Education Realty Trust (attached to NMHC Comments).

⁴⁵ NCTA Comments at 7 (internal quotation marks omitted).

Dated: June 8, 2017

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

By: _____/s/_____
WILLIAM K. SANDERS

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-6771
E-Mail: william.sanders@sfgov.org